

How to Lose the Rule of Law

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Review of Rebecca Sanders, “*Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror*” (New York: Oxford University Press, 2018)

It’s been almost 20 years since 9/11 and the declaration of a “war on terror.” That “war” didn’t rid the world of terrorism, but it did fundamentally alter perceptions of lawful and moral conduct in foreign affairs. The use of torture, indefinite detention, government surveillance, assassination and other crimes in the name of American security led to widespread political and scholarly condemnation—but no longer. Rebecca Sanders investigates why Americans so swiftly abandoned bedrock legal norms in her insightful book *Plausible Legality: Legal Culture and Political Imperative in the Global War on Terror*.

The United States is uniquely dependent on the rule of law. It was founded as a nation under law, not the rule of a monarch or a political institution. The founders hypothesized that law could bind a disparate people together, one lacking a common history, ethnicity and religion. In the United States the rule of law is not a luxury; it is the very definition of who we are. Sanders, a political scientist at the University of Cincinnati, orients her book around this exact point—the existential importance of law to the United States. She finds that by 9/11 the country had developed a culture antithetical to law, one in which “legal rationalization” has come to dominate. We now value the rhetoric justifying noncompliance as much as, and sometimes more than, compliance.

The book is a wake-up call to this marked deterioration of the country’s founding concept. The erosion in respect for law that it describes becomes rapid with the end of the Cold War. Some lawyers do continue to demand law compliance—consider the lawyers defending prisoners at Guantanamo—but Sanders fears the erosion has gone too far to be corrected. Beyond the acute post-9/11 crimes, she studies the steady weakening of the American commitment to the rule of law in general. Norms “could eventually be undone ... through a quiet and unexceptional process of plausibly legal reinterpretation” (168). This is the point of her book. It is a political, sociological and historical analysis, not a legal one.

To unravel how the United States reached this point, Sanders constructs three heuristics based on evidence of certain attitudes toward law in various periods of the nation’s history. All three attitudes are present throughout, but she finds one or the other tended to dominate at certain times. From the founding period to the start of the Cold War, Americans in power engaged in a “culture of exceptionalism.” During the Cold War, the government adhered to a “culture of secrecy,” but when secrecy could no longer be maintained, a culture of “legal rationalization” or “plausible legality” took over.

Sanders’s heuristics are more useful and accessible than typical political science

models for analyzing historical and social attitudes toward the law. Political science models tend toward overgeneralizations, as in the prisoner's dilemma model, or too much detail respecting particular incidents, as with so many models of the Cuban missile crisis. Sanders avoids these problems by focusing on actual events and providing enough historical facts to support her case for a dominant attitude toward law by U.S. foreign policy makers in three periods. She is able to link the identification of these dominant attitudes to the reasons for foreign policy decisions in defiance of law. These heuristics work to open awareness of how government officials sworn to uphold the law could so patently violate it.

Exceptionalism characterizes all periods of American life and helps to explain the attitude that the United States is a superior nation entitled to ignore the rules that bind lesser states. It is an attitude as evident in the first years of the Republic as it was at the end of the Cold War when the country emerged as the sole superpower. It is not, however, the attitude most destructive to the rule of law. Nor is the attitude of secrecy, which is also part of every era. Keeping law violations secret is a form of admission of wrongdoing. "Plausible deniability" was cooked up especially for the Cold War. It fit the culture of secrecy that grew out of a recognition that torture, invasion and assassination would not be tolerated in the human rights era that emerged following the Axis Power's atrocities in the Second World War. American presidents, therefore, adopted illegal practices but in such a way that allowed plausible deniability.

When the Cold War ended, however, so did the perceived need to keep law violations secret. The Clinton administration dramatically disregarded the U.N. Charter prohibition on the use of force with a 78-day bombing campaign during the Kosovo crisis. It could not be kept secret and was the first major U.S.

use of military force since 1945 in which no reference was made to the U.N. Charter to justify the start of the attack. Secretary of State Madeleine Albright is said to have told her British counterpart to get new lawyers if his were making a fuss about violating international law in attacking Serbia. Clinton also ordered the bombing of Afghanistan, Iraq and Sudan on, at best, flimsy justifications. Bombing and missile attacks are hard to hide and that came to include the first use of a drone to carry out an extrajudicial execution by Hellfire in 2000.

By 9/11, classified policies and practices were impossible to keep under wraps. Civil and human rights advocacy groups demanded government transparency, and U.S. officials understood they needed legal cover to avoid the scrutiny of courts and nongovernmental organizations (NGOs) for very public law violations. And they succeeded because both government and academic legal scholars moved U.S. policy from plausible deniability to "plausible legality." Suddenly Congress and the courts embraced this ideological shift with open arms, caught up in the new culture. The transition was aided by Bush administration officials expecting scrutiny from liberal human rights lawyers. Administration lawyers moved to provide legal cover with little apparent concern for the normative principles embedded in the substance of rules. Killing outside armed conflict hostilities, holding 800 men and boys captive at Guantanamo, and torturing detainees were all asserted to be lawful. The administration's lawyers wrote memos, briefs and law review articles. They correctly predicted that the courts, Congress and the public would find their arguments plausible. Within months of 9/11, the United States had replaced plausible deniability with plausible legality.

The approach did not end after Bush's presidency. Barack Obama signed an executive order ending torture, but he failed to fulfill other U.S. obligations

under the Convention against Torture and the Geneva Conventions regarding the prosecution of perpetrators of torture, including lawyers who gave erroneous legal advice. Beyond ending torture, Obama did little. He refused to take on the political cost of ordering Gitmo closed under his commander-in-chief authority, and he dramatically increased assassinations by drone. He personally authorized the extrajudicial killing of a U.S. citizen. To obscure it all, Obama's lawyers took up the practice of plausible legality in their own memos, articles, briefs, speeches, tweets and blog posts.

Sanders's critical point is that the plausible legality culture of our times not only led to extraordinary suffering, but it also is uniquely undermining respect for law. The culture of legal rationalization is more destructive than the cultures of exceptionalism and secrecy. If the courts accept absurd definitions of torture, fair trial, imminent attack and zone of armed conflict, why should anyone take any law seriously? Her concern is supported by even more evidence a year after the book went to press. Donald Trump's lawyers pay little or no attention to the law prohibiting the use of force, extrajudicial killing or indefinite detention. Treaty obligations and Security Council mandates are often deemed inconvenient and given little, if any, consideration.

Disrespect for international law has migrated to disrespect for U.S. law. Colleagues focus now on the risk of losing our democracy (see Aziz Z. Huq and Tom Ginsburg, *How to Save a Constitutional Democracy*, University of Chicago Press, 2018), but failure to comply with bedrock norms of international law is the first step toward contempt for law in general, including the Constitution.

Reversing the crisis will require a comprehensive approach, and Sanders is justifiably pessimistic over the prospects for success. Getting the United States to end serious international law violations is an almost overwhelming challenge. Much

basic knowledge of international law has been lost in the years of plausible deniability and plausible legality. Positivist and materialist legal theory and realist political theory have combined to leave us with no answer to the question, Why obey law that conveys no short-term benefit or detriment? Understanding law compliance for the good of the other has been lost. (I go into detail on the impact of realism on legal culture in a chapter in Karen Greenberg's forthcoming edited collection, *Reimagining the National Security State: Liberalism on the Brink*, Cambridge University Press, 2019.)

Sanders touches on realism, exposing the theory's antipathy for law. But, in my view, as a political scientist she could have gone much further in exploring realism's impact. Realism is based on Thomas Hobbes's dark view of human nature. It concludes that only material power matters in international relations. Law is an ideational construct dependent on good faith and belief in the common good. It requires a Grotian understanding of peoples' basic goodness and capacity for altruism. Sanders considers that liberalism and neoconservatism are the alternatives to realism. They are not. Both "isms" are heavily influenced by realism. The liberalism of the post-Cold War period, which John Mearsheimer calls "liberal hegemonism," and neoconservatism accept the use of military force regardless of legality to promote their agendas. The only actual theoretical alternative to realism in the Western philosophical canon is the commitment to the rule of law based on fundamental moral principles.

As the United States acquired more material power following the Second World War, George Kennan at the University of Chicago in 1951 was able to open the way for realism's future dominance when he condemned the traditional "legalism-moralism" of U.S. foreign policy. He produced a slogan that cleared the way for today's "realism-

materialism” as the ideology that led inexorably to the election of Donald Trump and away from, first, international law and, now, the rule of law. For Sanders, Trump’s positions are

striking, not simply because they endorse human rights abuses in the name of counterterrorism, but because they so flagrantly embrace violations of American and international law. ... [T]hey point to efforts to push legal culture ... toward a *culture of exception*. President Trump’s hostility to legal norms and judicial review are indicative of an emergent strand of Western politics outside liberal, legalistic rights culture. (153)

China’s emergence as a world leader demonstrates the imperative need to overcome the Trumpian trend. China’s challenge to the U.S. could finally persuade Americans to return to the long-standing commitment to authentic law at home and abroad. Some hopeful indications have emerged with, for example, the resolutions to withdraw from the Yemen civil war and new political interest in environmental protection, arms

control, refugee rights and ending inequality. These goals require treaties and other tools of international law.

Sanders is right, however, that “[t]hroughout the global war on terror, American policymakers manipulated law to permit what it should constrain. Forging a national security legal culture that resists this logic is necessary if human rights and humanitarian law are to effectively check human rights abuses in the future” (168). Building a new legal culture of resistance to law violation is a task of revolutionary dimensions. The decline in respect for law to this point took decades. We do not have decades for a turnaround. Sanders’s book pinpoints the problem and provides a concrete and, I believe, doable project: Teach against the dangerous concept of plausible legality. Replace it with renewed understanding of genuine legality and revive the American ideal of legalism-moralism.

Mary Ellen O’Connell’s most recent books are “Self-Defense Against Non-State Actors” (with C. Tams and D. Tladi, Cambridge University Press, July 2019) and “The Art of Law in the International Community” (Cambridge University Press, May 2019).

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